

*United States Court of Appeals
for the Second Circuit*

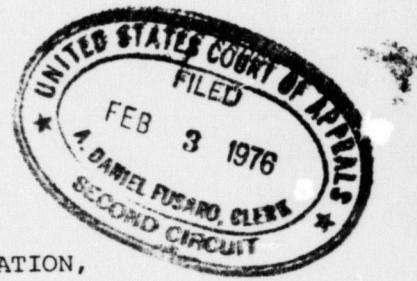


**PETITION FOR
REHEARING**

75-7076

In The UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-7076



THE ROBERT STIGWOOD GROUP LIMITED,
LEEDS MUSIC LIMITED and LEEDS MUSIC CORPORATION,
Plaintiffs-Appellants-Cross-Appellees,

v.

JOHN T. O'REILLY, JACK COYNE and ROBERT CASSIDY,
Defendants-Appellees-Cross-Appellants.

Docket No. 75-7077

TRACK MUSIC, INC., FABULOUS MUSIC LTD.
and NEW IKON, LTD.,
Plaintiffs-Appellants-Cross-Appellees,

v.

CONTEMPORARY MISSION, INC., JOHN T. O'REILLY,
JACK COYNE, PATRICK BERKERY and RICHARD PALMESE,
Defendants-Appellees-Cross-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

DEFENDANTS-APPELLEES-CROSS-APPELLANTS' PETITION FOR
REHEARING

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PETITION FOR REHEARING

In accordance with Rule 40 of the Federal Rules of Appellate Procedure, it is respectfully requested that a rehearing be granted in order to consider defendants' contentions that this Court, in its opinion of January 19, 1976, has overlooked or misapprehended the following points of law or fact:

1. For the purposes of computing "in lieu" statutory damages under 17 USC Section 101(b), when a copyrighted Class (e) musical composition is performed as part of a composite Class (d) dramatico-musical work such as "Jesus Christ Superstar" or "Tommy", said Class (e) musical composition does not possess separate dramatic rights.

2. Three of the copyrighted Class (e) musical compositions in the dramatico-musical work "Tommy" cover either non-existent material or constitute instances of "double copyrighting" by plaintiffs.

3. For purposes of computing "in lieu" statutory damages pursuant to 17 USC Sec. 101(b), the number of infringing performances should be thirty-eight, rather than forty-eight.

ARGUMENT

POINT I

A CLASS (e) MUSICAL COMPOSITION WHICH IS PERFORMED AS PART OF A COMPOSITE CLASS (d) DRAMATICO-MUSICAL COMPOSITION HAS NO DRAMATIC LIFE OF ITS OWN

In its opinion of January 19, 1976, this Court held that three Class (d) copyrights covering "Jesus Christ Superstar" (hereinafter, "Superstar") are like "superfluous protective layers" and are therefore duplicative. Two of these copyrights have therefore been excluded from the calculation of "in-lieu" statutory damages pursuant to 17 USC Sec. 101 (b). The Court further held that each of the Class (e) copyrighted musical compositions herein, consisting of three songs in "Superstar" and twenty-six selections in "Tommy", confer separate dramatic rights which were infringed over and above the Class (d) rights which were also infringed when defendants performed the entire respective dramatico-musical works. After thoroughly analyzing the holding in L.A. Westermann Co. v. Dispatch Printing Co., 249 U.S. 100 (1919), and analogizing the teaching of Westermann to the instant case, this Court concludes at p. 1600: "When the copyrights on the songs can lead their own copyright life, we take the teaching of Westermann to apply".

It is therefore apparent that the Court is prepared to

find duplication between copyrights of the same class, such as two Class (d) copyrights or two Class (e) copyrights, but is not prepared to find duplication where a Class (d) and a Class (e) copyright cover common subject matter.

It would be helpful to analyze the ramifications of this conclusion. What happens if a non-dramatic Class (e) copyright attempts to "cross over" into the territorial domain of a Class (d) dramtico-musical composition, as happened in "Tommy" and "Superstar"? For purposes of computing "in lieu" damages, the Class (e) composition must be able to live its own life "dramatically", i.e. independently of any dramatic rights associated with a Class (d) composite copyright. This Court has held that when defendants performed the rock opera "Supersta." they infringed upon "...the separate dramatic rights in each (Class (e))song exclusively given to Stigwood" (p.1599- original emphasis). In Stigwood v. Sperber 457 F. 2d 50 (2 Cir. 1972), this Court ruled that Jesus Christ Superstar depicts the last seven days in the life of Christ. In attempting to frame appropriate injunctive relief, Judge Kaufman realized that a simple limitation on the number of songs which could be performed would not prevent defendant Sperber from developing the story of the Passion of Christ. Nor would making insignificant changes in the sequence of the songs suffice. According to Judge Kaufman, the sequence of the songs

appeared to be the "linchpin" in the case. Thus:

"If the songs are not sung in sequence, i.e., no song follows another song in the OATC concert in the same order as in the original opera, and there are no costumes, scenery, or intervening dialogue, we are confident that the resulting performance could not tell the story of Jesus Christ Superstar."

Accordingly, in Sperber this Court recognized that it is only when the separate songs of "Superstar" are united with one another in a specific sequence that they spring to life "dramatically". In view of the foregoing, do any of the "Superstar" Class (e) compositions (such as "I Don't Know How To Love Him") standing alone tell the story of the last seven days of the life of Christ, or any significant part thereof? It is clear that they do not!

It is evident, therefore, that the individual Class (e) copyrighted songs of "Superstar" and "Tommy" have no independent or separate dramatic life. While these Class (e) rights may undoubtedly be employed to prevent the non-dramatic rendition of the songs as well as the misappropriation of the publication rights thereto, it is equally clear that where plaintiffs have chosen to protect their dramatico-musical works by registration under Class (d), they cannot "have their cake and eat it too". Herbert v. Shanley Co. 222 F. 344 (S.D.N.Y. 1915) aff'd, 229 F. 340 (2 Cir. 1916), rev'd

on other grounds, 242 U.S. 591 (1917), by utilizing the device of individually copyrighting each scene or song in order to mandate the collection of minimum statutory damages on a cumulative basis.

Moreover, unlike Sperber, defendants herein chose from inception to present the overall rock opera "Jesus Christ Superstar" in such a manner as to celebrate the divinity of Christ rather than to demean it, as did many (particularly plaintiffs) who presented "Superstar" at the time. It is therefore apparent that defendants' purpose was to perform the entire rock opera (albeit in a manner critical of plaintiff's method of presentation) rather than selected non-dramatic segments thereof, as Sperber claimed to be doing. Thus if defendants infringed any of plaintiff's rights in "Superstar", it must have been the dramatic Class (d) rights, and could not have been the non-dramatic Class (e) rights. Why? Because where Congress has allowed the same subject matter to be classified in two separate areas of classification, it could not have intended to permit these dual classifications to be used to collect double or multiple damages on the same act or performance, particularly since "in lieu" damages "shall not be regarded as a penalty" 17 USC Sec. 101 (b).

This construction is reinforced when one examines the circumstances, if any, under which the teaching of Westermann, supra applies to the present case. The test as stated is whether the

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copyrights on the songs can lead their own copyright life. But we must go further. We must ask whether the individual selections, each standing alone, can live a "dramatic" life. When they are tested against the rule enunciated in Sperber, supra, it is clear that they cannot live. It is only when they are united in a specific sequence that they live dramatically. However, the area in which they united (i.e. to form the dramatico-musical composition) has already been occupied by plaintiff's Class (d) copyright. Therefore, at least as far as the calculation of "in lieu" damages is concerned, the dramatic rights of the Class (e) copyrights cannot live without the Class (d) copyright, and are therefore subsumed within it. Where common subject matter is involved, one must choose either Class (e) or Class (d), but not both. If this is attempted, duplication must necessarily result. Since there is no doubt that defendants intended to, and did in fact perform the entire rock opera, it is respectfully submitted that they must be found liable under the Class (d), rather than the Class (e) copyright registrations.

In view of the foregoing, it is clear that Westermann is not applicable to the facts of this case. Defendants respectfully submit that one of the distinctions in Westermann noted by this Court, namely the fact that the separate copyrighted illustrations were not covered by a composite copyright of all, is absolutely crucial, particularly in view of the realization that the Class (e)

copyright coverage essentially duplicates the Class (d) copyrights on "Superstar" and "Tommy".

In summary, "in lieu" damages should be calculated with respect to the Class (d) copyrights only, since any inclusion of damages based upon "separate" Class (e) dramatic rights are inherently duplicative and therefore unjustly multiply statutory damages virtually at the whim of the copyright owner without any compelling reason of policy.

POINT II

THREE OF THE COPYRIGHTED CLASS (e)
MUSICAL COMPOSITIONS IN THE DRAMATICO-
MUSICAL WORK "TOMMY" COVER EITHER NON-
EXISTENT MATERIAL OR CONSTITUTE
INSTANCES OF "DOUBLE COPYRIGHTING" BY
PLAINTIFFS

The potential ramifications of the Opinion as presently constituted should not be overlooked. If the decision is not modified, composers of future dramatico-musical works will be encouraged to copyright every conceivable segment or portion of a song in order to ensure that the greatest possible multiplication of "in lieu" statutory damages is achieved. Moreover, if the copyright owner of a dramatico-musical work such as "Tommy" is able to collect minimum "in lieu" statutory damages of \$6750.00 for each unauthorized performance of the opera, he may well deem it advisable not to seek

preliminary injunctive relief in order to nip an unauthorized tour in the bud; rather, he may decide to sit back and wait until the tour is complete and then sue for "in lieu" damages of \$6,750.00 per performance.

By way of example, if the defendants' performances of "Tommy" were to gross the same amount as their performances of "Superstar", the average gross receipts per performance of "Tommy" (before deducting any expenses whatsoever) would have been approximately \$5,000.00. If the "Tommy" tour achieved the same level of success as did the "Superstar" tour, the gross receipts (before expenses) for fifty performances of "Tommy" would have been \$250,000.00. In consonance with this Court's ruling on "in lieu" damages, plaintiffs would receive minimum statutory damages of \$338,500.00! Defendants respectfully contend that such an award would be tantamount to a penalty in violation of the provisions of Section 101 (b).

It is respectfully submitted that under these circumstances, most copyright owners would be extremely reluctant to seek injunctive relief, but would instead sit back and wait for the "in lieu" damages to roll in. From a policy standpoint, such a result would be extremely unfortunate, particularly in view of the fact that "in lieu" damages are supposed to be pleaded only where defendants' profits are not actually ascertained, or where plaintiff's damages are not proved. No matter how ambiguous the provisions of Section 101 (b),

this much is clear--Congress could not have intended that the measure of "in lieu" damages be made so attractive that copyright owners are predisposed to ignore proof of actual profits and damages in order to claim "in lieu" damages.

Moreover, this Court's ruling makes it very tempting to "chop up" a rock opera into as many song segments as possible in order to maximize "in lieu" damages. As an illustration thereof, the procedure followed by plaintiffs in copyrighted "Tommy" provides a classic example of chopping up a dramatico-musical work. One of the Class (e) copyrights of "Tommy" is "See Me, Feel Me" (App. 57). This song is identified as the "Finale" from "We're Not Gonna Take It". However, an examination of the latter song in the libretto of "Tommy" (see reference to Exhibit 4, p. 6 on App. 68) reveals no reference whatsoever to a song entitled "See Me, Feel Me" or to a "Finale". In fact, the last stanza, (reproduced below) of "We're Not Gonna Take It" is identical to a portion of still another class (e) copyrighted song "Go To The Mirror Boy" (App 57):

"We're Not Gonna Take It"

...."Tommy": Listening to you I get the music
 Gazing at you I get the beat
 Following you I climb the mountain
 I get excitement at your feet!
 Right behind you I see the millions
 On you I see the glory
 From you I get opinions
 From you I get the story

"Go To The Mirror Boy"

... "Tommy": Listening to you I get the music
 Gazing at your I get the beat

Following you I climb the mountain
I get excitement at your feet!
Right behind you I see the millions
On you I see the glory
From you I get opinions
From you I get the story

The foregoing is a blatant example of plaintiffs' attempts to obtain duplicate copyright coverage by chopping up the opera into as many segments as possible. It is obvious that "See Me, Feel Me" is either non-existent or is a duplicate of yet another copyrighted song portion of "Tommy".

Speaking of non-existent songs, defendants have searched the libretto of the rock opera "Tommy" in vain trying to find some mention of the Class (e) copyrighted song "Tommy" (App. 56). Although there is obviously a Class (d) registration for "Tommy" (the entire rock opera), nowhere is there any mention of the Class (e) song, "Tommy"! Moreover, this non-existent song is listed immediately before the Class (e) "Overture" for "Tommy" (App. 56) when it is common knowledge that the Overture signifies the opening or beginning of the rock opera (see, e.g., n. 4 of Sperber, supra). The attempt to copyright a non-existent song is an equally blatant example of plaintiffs' attempts to illicitly secure copyright coverage.

Perhaps the most blatant example of "double copyrighting" by plaintiffs concerns the Class (e) song "Pinball Wizard". Plaintiffs have secured and claimed damages on two separate Class (e)

copyrights for "Pinball Wizard" (App. 56) despite the fact that the libretto of "Tommy" sets forth only one song entitled "Pinball Wizard". Since plaintiffs' own affidavit states that defendants' performances of "Tommy" followed the libretto verbatim (App.68), it follows that defendants sang only one rendition of "Pinball Wizard" per performance. Yet plaintiffs have the effrontery to claim that two copyrights of the song were infringed by each performance.

In summary, plaintiffs' attempts to needlessly multiply statutory damages, as exemplified by the examples of the aforementioned copyrights, provides an unsettling glimpse into the future, unless the Opinion of January 19, 1976, is modified, in order to eliminate the possibility of "double copyrighting" where common subject matter is involved, particularly where such duplication involves Class (d) and Class (e) copyrights.

POINT III

FOR PURPOSES OF COMPUTING "IN LIEU" STATUTORY DAMAGES PURSUANT TO 17 USC SEC. 101(b), THE NUMBER OF INFRINGING PERFORMANCES SHOULD BE THIRTY-EIGHT, RATHER THAN FORTY-EIGHT

This Court held at p. 1591 that pursuant to Local Rule 10 (a) 3 plaintiffs averred, supported by affidavit, that defendants

performed "Jesus Christ Superstar" on at least sixty separate occasions, and that "defendants did not rebut by affidavit that there had been at least sixty performances (emphasis added). But under the provisions of Rule 10 (a) (3) (reproduced below), defendants were not required to rebut plaintiffs' averments by affidavit:

Rule 10 (a) 3

Upon motion for summary judgement there shall be annexed to the motion a separate short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

The papers opposing a motion for summary judgement shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

Since defendants disputed plaintiffs' averments as to the number of performances at p. 16 of their Memorandum of Law In Opposition to Plaintiffs' Motion For Summary Judgement, which dispute was noted by Judge Zampano in his Ruling on Plaintiffs' Motion For Summary Judgment (App. 42), it is clear that defendants' opposing papers in fact disputed plaintiffs' averments of at least sixty performances.

Accordingly, it is respectfully submitted that this Court should set aside its ruling that the District Court erred in taking a baseline figure of fifty concerts for the computation of "in lieu" damages. If it is deemed necessary to establish the precise number of performances of "Superstar", defendants respectfully contend that this be determined at an evidentiary hearing in the District Court.

CONCLUSION

It is respectfully submitted that the Opinion of
January 19, 1976 be modified as follows:

1. That "in lieu" statutory minimum damages be awarded with respect to the Class (d) copyright for "Superstar" and "Tommy" only.
2. That the Class (e) copyrights "Tommy", "Pinball Wizard" (either Eu 109526 or Ep 259150-App. 56) and "See Me, Feel Me" be excluded from any calculation of "in lieu" statutory damages.
3. That the number of infringing performances of "Superstar" be reduced from forty-eight to thirty-eight.

Respectfully submitted,

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